ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: General Electric Company Permit No. MAD002084093	RCRA Appeal Nos. 16-01, 16-02, 16-03, 16-04, and 16-05

ORDER GRANTING REQUESTS FOR EXTENSION OF TIME, DENYING THE REGION'S REQUEST TO FILE A CONSOLIDATED RESPONSE, AND CLARIFYING THAT GENERAL ELECTRIC MAY FILE A RESPONSE

Five petitions have been filed for review of a modification to a Resource Conservation and Recovery Act ("RCRA") permit that the U.S. Environmental Protection Agency, Region 1, issued on October 24, 2016. *In re General Electric Co.*, Appeal Nos. 16-01, 16-02, 16-03, 16-04, and 16-05. Pending before the Board are three motions.

First, the Region has filed a motion requesting (1) an extension until January 31, 2017, to submit its response to the five petitions, the certified index to the record, and the relevant portions of the record; and (2) permission to file one consolidated brief, limited to 56,000 words, responding to all five petitions. The Region's motion is for the most part unopposed by the parties to the five petitions, although the General Electric Company ("General Electric") opposes the Region's request for a 56,000-word limitation for a consolidated brief. General Electric argues that if the Board were to grant the Region's request for an overall limitation of 56,000 words, the Region would be allowed to exceed the Board's previously imposed 17,000-word limitation as to the Region's response to General Electric's petition. *In re General Electric Co.*,

Appeal No. 16-01M (Nov. 8, 2016) (Order Granting Request for Exceedance of Word Limitations).

Second, General Electric has filed a notice of appearance in the petition for review filed by the Housatonic Rest of River Municipal Committee ("Municipal Committee") (Appeal No. 16-04) and an unopposed motion for clarification of its right to respond to that petition. General Electric has also requested that the Board extend the deadline for its response to the Municipal Committee's petition to align with the deadline established for the Region's response to the five petitions. General Electric has indicated that its response brief would not exceed 7,000 words.

Third, the State of Connecticut has filed an unopposed motion for extension of time until January 31, 2017, as the deadline for its response to General Electric's petition (Appeal No. 16-01) pursuant to 40 C.F.R. § 124.19(b)(4).

After consideration of these three motions, and all responses filed, the Board rules as follows:

(1) **The Board grants the Region's request for an extension of time to file its responses to the five petitions and establishes a due date of January 31, 2017, denies the Region's request to file a consolidated response brief to all five petitions with a limitation of 56,000 words, and orders that the Region file a single copy of the certified administrative record and relevant portions of the record for all petitions**. The Board finds that granting the Region an extension to and including January 31, 2017, to file its response briefs to the petitions, certified index to the record, and relevant portions of the administrative record is appropriate and justified. Such an extension is reasonable given that there are five petitions that raise multiple complex issues. Further, no party opposed the Region's request for an extension of time.

With respect to the Region's request to file a consolidated response to the five petitions with a word limitation of 56,000 words, based on the disparate and often conflicting arguments made in the five petitions and the Region's basis for requesting to file a consolidated response, the Board is not convinced that consolidation of the Region's responses into a single brief outweighs the potential downsides of a consolidated response from the Region. Requiring the Region to file separate responses to each petition will promote efficiency by insuring that the Region responds to the issues raised by each petitioner in a manner easily accessible to the Board. Further, given that EPA's permit appeal regulations impose identical word limitations on petitions *and* responses, the Board agrees with General Electric's concerns about allowing the Region to file a consolidated brief that does not include a limitation on the number of words that could be used to address the separate petitions. *See* 40 C.F.R. § 124.19(d)(3) (imposing identical length restriction of 14,000 words on petitions and responses). Accordingly, the Region must file a separate response brief to each petition. Consistent with the Board's prior order, the word limitation for the Region's response to the petition from General Electric is 17,000 words. *In re General Electric Co.*, Appeal No. 16-01M (Nov. 8, 2016) (Order Granting Request for Exceedance of Word Limitations). The word limitation for the other four responses is 14,000 words. 40 C.F.R. § 124.19(d)(3). The Region should file a single copy of the certified index to the record and the relevant portions of the record.

(2) **The Board clarifies that General Electric may respond to the appeal initiated by the Municipal Committee (Appeal No. 16-04) and establishes a due date for its response of January 31, 2017.** Neither the Municipal Committee nor the Region opposes General Electric filing a response to this petition. For many years, the Board and the Administrator have heard third-party permit appeals where the permit applicant has been allowed to file a response to the

petition. Generally, in those cases, the permit applicant is not also a petitioner. *See, e.g., In re Pio Pico Energy Ctr.*, PSD Appeal Nos. 12-04 – 12-06, slip op. at 7, 16 (EAB Aug. 2, 2013); *In re Waste Techs. Indus.*, 1 E.A.D. 831, 834 n.6 (Adm'r 1984). Recently, EPA has amended the permit appeal regulations to explicitly grant a permit applicant who did not file a petition the opportunity to file as a matter of right a response to a petition from a third party challenging the permit. *See* 40 C.F.R. § 124.19(b)(3). A purpose of this amendment was to "streamline" the procedures for permit applicants who wish to participate in permit appeals in these circumstances by eliminating the need for them to first file a motion. Revisions to Permit Appeal Rules, 78 Fed. Reg. 5281, 5283 (Jan. 23, 2013). This provision was not intended to preclude permit applicants who challenge the terms of a permit from defending their interests by responding to a separate petition that is contrary to the interests of the permit applicant. Whether a permit applicant files a petition or not, the permit applicant has a legitimate interest in participating in an appeal by an adverse party.

Here, the Municipal Committee takes a position contrary to General Electric's position. General Electric challenges the permit arguing certain requirements are unwarranted (Appeal No. 16-01), while the Municipal Committee maintains that the permit should impose additional requirements on General Electric (Appeal No. 16-04). Accordingly, pursuant to the Board's authority to do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal, 40 C.F.R. § 124.19(n), we clarify that General Electric may participate in the appeal filed by the Municipal Committee by filing a response brief. General Electric's response brief is limited to 14,000 words, as specified in 40 C.F.R.

§ 124.19(d)(3),[1] and the Board grants General Electric's request for an extension of time until January 31, 2017, to file its brief. No party has opposed General Electric's extension request and fairness supports a common due date for all responses.

(3) **The Board grants the State of Connecticut's unopposed motion for extension of time to file its response to General Electric's Petition (Appeal No. 16-01) and establishes a due date of January 31, 2017.** As a state where the permitted remedial site is located, Connecticut is explicitly authorized to participate in General Electric's appeal. *Id.* § 124.19(b)(4). No party has opposed Connecticut's extension request and, as indicated, fairness supports a common due date for all responses.

So ordered.

ENVIRONMENTAL APPEALS BOARD[2]

Dated: 12/15/16

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

[1] General Electric interpreted 40 C.F.R. § 124.19(d)(3) as limiting its brief to 7,000 words, the limitation that typically applies to reply briefs. Because the Board is allowing General Electric to file a response brief, that response brief is subject to the default 14,000-word limit applicable to response briefs. 40 C.F.R. § 124.19(d)(3).

[2] The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *ORDER GRANTING REQUESTS FOR EXTENSION OF TIME, DENYING THE REGION'S REQUEST TO FILE A CONSOLIDATED RESPONSE, AND CLARIFYING THAT GENERAL ELECTRIC MAY FILE A RESPONSE* issued December 15, 2016, in the matter of *In re General Electric Co.*, RCRA Appeal Nos. 16-01, 16-02, 16-03, 16-04 and 16-05, were sent to the following persons in the manner indicated:

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